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In the

Supreme Court of the United States

October Term, 1984

William Lloyd Hill *Petitioner*

v.

A. L. Lockhart, Director,
Arkansas Department of Correction *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

WHETHER A STATE PRISONER IS ENTITLED TO AN EVIDENTIARY HEARING IN UNITED STATES DISTRICT COURT HABEAS CORPUS PROCEEDING WHERE THE PRISONER HAD PLEADED IN HIS PETITION THAT HIS STATE COURT NEGOTIATED GUILTY PLEA WAS INVOLUNTARY AND RESULTED FROM INEFFECTIVE REPRESENTATION OF COUNSEL IN THAT HIS ATTORNEY MISADVISED HIM AS TO HIS POTENTIAL PAROLE ELIGIBILITY DATE AND AS A RESULT OF THAT ADVICE THE PRISONER ACCEPTED THE PLEA OFFER AND ENTERED THE GUILTY PLEA?

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

In case No. CR-78-1922, filed in Pulaski County Circuit Court, State of Arkansas, petitioner was charged with murder in the first degree, Count I and theft of property, Count II. (Joint Appendix 66). On April 6, 1979, petitioner, with the advice of counsel, executed a Plea Statement indicating he wished to plead guilty. (Joint Appendix 28-29). On that same date, petitioner appeared in open court, accompanied by defense counsel, for the purpose of entering a plea of guilty. Pursuant to a negotiated sentence recommended by the State, petitioner entered a plea of guilty, with recommended terms of 35 years imprisonment on the first degree murder charge and 10 years imprisonment on

the theft of property charge, said terms to run concurrently. The state circuit court accepted petitioner's plea and the State's recommendation and sentenced petitioner accordingly. The state circuit court advised petitioner he would have to serve at least one-third of his sentence before becoming eligible for parole. (Joint Appendix 66-70).

Thereafter, petitioner sought state post-conviction relief on the grounds that his guilty plea was involuntary because sentence was imposed in violation of the plea bargain. That motion was denied by the Pulaski County Circuit Court October 21, 1980. (Joint Appendix 13).

Pursuant to 28 U.S.C. §2254 petitioner filed a Petition for Writ of Habeas Corpus in federal district court June 30, 1981. (Joint Appendix 3-11). As stated by the district court, petitioner contended his guilty plea was involuntary and that defense counsel had been ineffective because he had not accurately advised petitioner regarding his parole eligibility. (Petition for Writ of Certiorari, Appendix A-1). Specifically, petitioner contended he had been advised he would be eligible for parole after serving one-third his sentence. As a second offender, however, he is not eligible for parole until serving one-half his time.

The district court denied relief without an evidentiary hearing. (Opinion reproduced in Petition for Writ of Certiorari, Appendix A). The Court of Appeals for the Eighth Circuit affirmed that decision and likewise denied rehearing en banc. (Opinions reproduced in Petition for Writ of Certiorari, Appendix B, C).

The basis for the decision below was that, based on the state court record of the plea hearing, petitioner's parole eligibility was not part of the bargain when petitioner entered his guilty plea, nor was it a consideration on which he relied when entering his plea. It was further held that parole eligibility is a collateral, not a direct consequence of a guilty plea on which petitioner need not be informed. Thus,

any alleged misadvice on that issue does not render petitioner's plea involuntary nor defense counsel ineffective.

On March 18, 1985, the United States Supreme Court granted review of this case by Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Court has held that the hearing at which a criminal defendant enters a plea of guilty must show that the plea was entered voluntarily and knowingly. A plea of guilty is itself a conviction and nothing remains except to give judgment and determine punishment. *Boykin v. Alabama*, 395 U.S. 238 (1969). When a defendant seeks to set aside a plea of guilty, the focus is on the voluntariness of the plea itself and the advice rendered by counsel. This Court has previously held that an attorney's advice to a defendant who enters a plea is not assessed in retrospect but rather, is examined as whether it is within the range of competence demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

The plea bargaining process is established in our criminal justice system. For that process to have its greatest potential for disposing of criminal cases, criminal convictions must be accorded finality. Thus the record of a guilty plea is accorded a presumption of verity and correctness. *Blackledge v. Allison*, 431 U.S. 63 (1977).

Petitioner herein was charged with theft of property and murder in the first degree in an Arkansas state court. He pleaded guilty and was sentenced to 35 years imprisonment, pursuant to a sentence recommended by the State prosecutor. Petitioner entered his plea in open court after executing a plea statement and the sentence recommendation, though not binding on the trial court, was accepted and sentence entered accordingly. In a subsequent habeas corpus petition (28 U.S.C. §2254), petitioner sought to set aside his plea contending that the plea agreement included his eligibility for parole after serving one-third his sentence and that defense counsel had misadvised him regarding this issue. Under Arkansas law, petitioner, as a second offender, is not eligible for parole until he has served one-half his prison sentence.

The district court and the Eighth Circuit Court of Appeals denied relief without an evidentiary hearing. Respondent asserts that the correct result has been reached in this case.

Generally, parole eligibility is not a direct, but rather a collateral, consequence of a guilty plea. It is unnecessary to advise a defendant who desires to plead guilty as to his parole eligibility. If a defendant is misadvised on that issue, his guilty plea is not rendered involuntary. Here, on the basis of the state court record, parole eligibility was not part of the plea bargain. Thus, petitioner was not wrongfully induced to plead guilty. Moreover, the plea bargain here was not binding on the state court under Arkansas law. Petitioner, therefore, did not know until his plea was accepted by the state court what sentence would be imposed. Any indications by defense counsel regarding parole eligibility amount to no more than an estimate regarding the sentence that might be imposed. Petitioner's expectation here was based on his subjective belief of what his sentence would be, coupled with a hope for leniency. Petitioner was not entitled to an evidentiary hearing since the issues raised can be decided on the strength of the state court record of his plea hearing.

Even if counsel erred in his advice on a statutory provision, counsel is not rendered ineffective per se, nor has petitioner been prejudiced. If this Court has not extended the prejudice component to collateral attacks on judgments the basis of which are guilty pleas, it is strongly urged to do so in this case. *Stockland v. Washington*, ____ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As previously argued, petitioner here did not rely on counsel's advice regarding parole eligibility in entering his plea of guilty. Moreover, a convicted person does not have a constitutional right to be released on parole in Arkansas. The possibility of parole provides an inmate with nothing more than the mere hope that the benefit will be obtained. *Greenholtz v. Inmates of Nebraska Penal & Cor.*, 442 U.S. 1 (1979).

Petitioner here bargained for 35 years imprisonment and that is the sentence that was imposed. Whether petitioner is eligible for parole after serving one-third or one-half of that term, he still must serve the sentence reflected in the judgment. The denial of parole merely requires the petitioner to serve out the length of his sentence.

Criminal convictions must have finality. That principle is strongest when applied to collateral attacks on judgments in criminal cases. The court below properly denied petitioner habeas relief, without an evidentiary hearing. The judgment of the Eighth Circuit Court of Appeals should be affirmed.

ARGUMENT

I.

In case No. CR-78-1922, filed in Pulaski County Circuit Court, State of Arkansas, petitioner was charged with murder in the first degree, Count I and theft of property, Count II. (Joint Appendix 66). On April 6, 1979, petitioner, with the advice of counsel, executed a Plea Statement which indicated he voluntarily pleaded guilty because he was guilty as charged. (Joint Appendix 28-29). On that same date, petitioner appeared in open court, accompanied by defense counsel, and entered a negotiated plea of guilty to the charges. He was sentenced to a 35 year term of imprisonment on the charge of first degree murder and a term of 10 years imprisonment on the charge of theft of property, said sentences to run concurrently.¹ After accepting petitioner's guilty plea and imposing sentence, the circuit court stated petitioner would be required to serve at least one-third of his sentence before becoming eligible for parole. (Joint Appendix 69-70).

Thereafter, petitioner sought state post-conviction relief on the grounds that his guilty plea was involuntary because sentence was imposed in violation of a negotiated plea bargain. That motion was denied by the Pulaski County Circuit Court October 21, 1980. (Petition for Writ of Certiorari, Appendix A 1-2; Joint Appendix 13).

Pursuant to 28 U.S.C. §2254, petitioner filed a Petition for Writ of Habeas Corpus in federal district court on June 30, 1981. (Joint Appendix 3-11). As stated by the district court, petitioner contended therein that his guilty plea was

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The State court record of the plea hearing reflects sentence imposed at two years on the theft of property charge. (Joint Appendix 69). The district court below viewed this as either a misstatement or typographical error, and noted that issue had not been raised by petitioner. (Petition for Writ of Certiorari, Appendix A 3)

involuntary as indicated above; that defense counsel was ineffective because he had not accurately advised petitioner regarding his parole eligibility; and that he was denied due process during his appeal of the court's denial of his motion to withdraw his plea. (Petition for Writ of Certiorari, Appendix A-1). The district court denied relief on all three grounds without an evidentiary hearing. (Opinion reproduced in Petition for Writ of Certiorari, Appendix A 1-13). The Court of Appeals for the Eighth Circuit affirmed that decision and likewise denied rehearing en banc. (Opinions reproduced in Petition for Writ of Certiorari, Appendix B 1-12; Appendix C 1).

The issue before the Supreme Court on grant of certiorari concerns petitioner's allegation that defense counsel misadvised him regarding his earliest parole eligibility date. Petitioner contends counsel advised that he would be eligible for parole after serving one-third of his sentence. Pursuant to Ark. Stat. Ann. §43-2829B. (3) (Repl. 1977) petitioner, as a second offender was not, at the time he entered his guilty plea, eligible for parole until serving one-half of the sentence imposed, with credit for good time allowances. In contrast, inmates classified as first offenders, except those under 21 years of age, are eligible for parole after serving a minimum of one-third their sentence, with credit for good time. Ark. Stat. Ann. §43-2829B. (2) (Repl. 1977). Petitioner contends defense counsel's advice renders his guilty plea involuntary. He also contends that counsel himself was ineffective in rendering this advice, thereby violating petitioner's rights under the Sixth Amendment.

Initially, respondent notes that petitioner's characterization in his brief on the merits that respondent admits petitioner was misinformed regarding parole eligibility both by defense counsel and the circuit court is in need of clarification.

The district court and the Eighth Circuit Court of Appeals denied relief to petitioner without an evidentiary

hearing. In doing so, it appears to respondent that their respective conclusions were based on petitioner's allegations, if true, as well as the conclusiveness of the state court record at the guilty plea hearing.² Dismissal of a habeas corpus petition is proper without a hearing where allegations, if true, fail to state a claim cognizable in a federal habeas corpus proceeding. *Linder v. Wyrick*, 644 F.2d 724 (8th Cir. 1981), citing *Parton v. Wyrick*, 614 F.2d 154 (8th Cir. 1980) cert. denied, 449 U.S. 846 (1980). Dismissal is also proper where the facts are not in dispute or where any dispute can be resolved on the basis of the existing state court record. *Linder v. Wyrick*, *supra*. The Supreme Court has indicated that a petitioner in a habeas corpus action may be entitled to an evidentiary hearing where the petition sets out detailed factual allegations which are not vague and indicate specifics of who, when, where, etc. *Blackledge v. Allison*, 431 U.S. 63 (1977); *Machibroda v. United States*, 368 U.S. 487 (1962).

Respondent is aware of no fact, in the record, outside of petitioner's allegation in his habeas petition which would support an admission that defense counsel misadvised petitioner regarding his eligibility for parole and does not

The district court concluded that "even if petitioner [had been] misled by predictions of counsel or statements of the sentencing judge," regarding parole eligibility, that issue "is not such a consequence of his guilty plea that such misinformation renders his plea involuntary." (Petition for Writ of Certiorari, Appendix A 8). The district court further concluded that the fact that defense counsel may have misadvised petitioner, or gave advice which was not totally accurate, such advice does not render counsel's performance constitutionally inadequate. (Petition for Writ of Certiorari, Appendix A 10). In contrast, the district court observed that the circuit court was "entirely correct" in stating that petitioner would have to serve at least one-third of his sentence before becoming eligible for parole. (Petition for Writ of Certiorari, Appendix A 11).

The Court of Appeals concluded that even if counsel's advice was not wholly accurate, petitioner would not be entitled to withdraw his guilty plea. (Petition for Writ of Certiorari, Appendix B 8).

concede the same. The record of the guilty plea hearing reflects the statement to petitioner by the state circuit court. The tenor of respondent's response to the petition for writ of certiorari is that, assuming *arguendo*, the truth of petitioner's allegations, petitioner is entitled to no relief because parole eligibility was not part of the bargain as reflected by the guilty plea hearing and the issues can be resolved on the basis of that hearing. Further, parole eligibility is a collateral consequence of a guilty plea and any alleged misadvice thereon does not render the plea involuntary. Petitioner is cognizant of respondent's position since petitioner asserts that remand of this case would establish a procedure of allowing a hearing regarding an allegation of an attorney's affirmative misadvice concerning parole eligibility. See, petitioner's brief on the merits, p. 18. Thus, the truth of petitioner's factual allegations in his habeas petition is not admitted here.

II.

Recognizing the waiver of federal constitutional rights that take place when a defendant enters a plea of guilty, the Supreme Court held in *Boykin v. Alabama*, 395 U.S. 238 (1969) that the record of the hearing must affirmatively show that the plea was entered voluntarily and knowingly. A plea of guilty is itself a conviction since nothing remains except to give judgment and determine punishment. *Id.* at 242.

Later, in what has become known as the *Brady* trilogy, the allegation of several defendants that their guilty pleas should be set aside, absent clear evidence of coercion, without more, did not entitle them to withdrawal of their respective pleas. *Brady v. United States*, 397 U.S. 742 (1970) (fear of death penalty did not render plea involuntary). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* at 757. In *Parker v. North Carolina*, 397 U.S.

790 (1970), the Court looked to determine if the plea was intelligently entered and concluded that, even if defense counsel mistakenly thought the defendant's confession was admissible, the plea would not be set aside as long as the advice of counsel was within the range of competence. Finally, in *McMann v. Richardson*, 397 U.S. 759 (1970) defendants who alleged their guilty pleas were entered because of alleged coerced confessions, without more, were not entitled to a habeas corpus hearing. In that case, the Court indicated that whether a guilty plea was intelligently entered does not mean that defense counsel's advice must withstand retrospective examination in a post-conviction hearing. Rather, an attorney's advice is assessed in the context of whether it is within the range of competence demanded of attorneys in criminal cases. The defendant who desires to plead guilty assumes the risk of ordinary error in his attorney's assessment of the law and the facts. *Id.* at 770-771.

The Supreme Court has recognized that the plea bargaining process is an important component of the criminal justice system. *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *Blackledge v. Allison*, 431 U.S. 63 (1977). Although there is no constitutional right to a plea bargain, *Weatherford v. Bursey*, 429 U.S. 545 (1977) the plea bargaining process, properly administered, is to be encouraged due to the desirable benefits that flow to the defendant, the criminal justice system and society at large. *Santobello v. New York*, 404 U.S. 257 (1971).³ For the process to be credibly utilized,

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In *Santobello v. New York*, 404 U.S. 257, 261 (1971) the desirable benefits of plea bargaining were discussed as follows:

"It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." See, *Brady v. United States*, 397 U.S. 742, 751-752 (1970).

criminal cases the disposition of which rests on the entry of guilty pleas in open court must be "accorded a great measure of finality."⁴ *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Although a habeas petitioner, by pleading detailed factual allegations, may be entitled to an evidentiary hearing, the record of a guilty plea declared in open court

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The Court expressed its views toward finality of disposition in *Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977) as follows:

"To allow indiscriminate hearings in federal postconviction proceedings, whether for federal prisoners under 28 U.S.C. §2255 or state prisoners under 28 U.S.C. §§2241-2254, would eliminate the chief virtues of the plea system—speed, economy, and finality. And there is reason for concern about the prospect. More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult. If he convinces a court that his plea was induced by an advantageous plea agreement that was violated, he may obtain the benefits of its terms. A collateral attack may also be inspired by 'a mere desire to be freed temporarily from the confines of the prison.' Citing *Price v. Johnston*, 334 U.S. 266, 284-285; accord *Machibroda v. United States*, 368 U.S. 487, 497 (Clark, J. dissenting).

In the United States District Courts, out of a total of 35,391 defendants convicted and sentenced, 29,814 pleaded guilty and 709 entered pleas of nolo contendere. Source: Detailed Statistical Tables, Annual Report of the Director of the Administration Office of the United States Court for the twelve month period ending June 30, 1983.

In the United States District Courts, figures for the fiscal year 1977 reflect that 36,505 defendants were convicted and sentenced. Of those, 31,112 entered pleas of guilty or nolo contendere.

In the United States District Courts, figures for the fiscal year 1978 reflect that 32,913 defendants were convicted and sentenced. Of those 27,295 entered pleas of guilty or nolo contendere.

Source: Annual Report of the Director of the Administrative Office of the United States Courts, 1970-79, Criminal Statistical Tables, Table D-7.

carries "a strong presumption of verity." *Id.* at 74. As observed by this Court in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Id.*, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. The Court of Appeals for the Eighth Circuit has recognized that the procedures utilized in Arkansas state courts are sufficient to show voluntariness of the guilty plea and "are closer to those requiring a hearing 'only in the most extraordinary circumstances.'" *Pennington v. Housewright*, 666 F.2d 329, 331, 332 (8th Cir. 1982), cert. denied 102 S.Ct. 1775 (1982).⁵

III.

Against this background, the district court and the Eighth Circuit Court of Appeals denied petitioner's request to withdraw his guilty plea, without an evidentiary hearing. Both Courts concluded that petitioner's parole eligibility was not a part of the bargain when petitioner entered his plea of guilty, nor was it a consideration in petitioner's decision to plead guilty. The basis for this determination was the transcript of the hearing wherein petitioner entered his respective guilty pleas. As noted by the district court below, petitioner affirmed to the state trial court at the hearing that the terms of the plea agreement with the State included periods of incarceration of 35 and 10 years respectively. The state court thereupon entered judgment and sentenced petitioner accordingly. Specifically, in denying relief without an evidentiary hearing, the district court and

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Pursuant to Arkansas Rules of Criminal Procedure 24.4, 24.5, 24.6, 24.7, Ark. Stat. Ann. Vol. 4A (Repl. 1977) procedures which must be followed when accepting a defendant's plea of guilty are set forth as follows:

RULE 24.4 Advice by Court.

The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally, informing him of and determining that he understands:

- (a) the nature of the charge;
- (b) the mandatory minimum sentence, if any, on the charge;
- (c) the maximum possible sentence on the charge, including that possible from consecutive sentences;
- (d) that if the offense charged is one for which a different or additional punishment is authorized because the defendant has previously been convicted of an offense or offenses one (1) or more times, the previous conviction or convictions may be established after the entry of his plea in the present action, thereby subjecting him to such different or additional punishment; and
- (e) that if he pleads guilty or nolo contendere he waives his right to a trial by jury and the right to be confronted with the witnesses against him, except in capital cases where the death penalty is sought.

RULE 24.5 Determining Voluntariness of Plea.

The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea.

RULE 24.6 Determining Accuracy of Plea.

The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea.

RULE 24.7 Record of Proceedings.

The court shall cause a verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere to be made and preserved.

the Court of Appeals held (1) parole eligibility is a collateral, not a direct consequence of a guilty plea and alleged misinformation thereon does not render a defendant's plea involuntary, especially when it is not part of the plea bargain; and (2) it is unnecessary to communicate parole eligibility requirements to a defendant who desires to plead guilty and thus, defense counsel's alleged erroneous advice thereon does not render counsel ineffective.

In reaching its conclusion, the Eighth Circuit Court of Appeals relied upon a previous decision it had rendered, *United States v. DeGand*, 614 F.2d 176 (8th Cir. 1980). DeGand claimed that he had not pleaded guilty with full knowledge of the consequences because the district court failed to inform him that his federal sentence might not run concurrently with his state sentence. The sentencing record indicated that DeGand had been fully advised of his rights. Defense counsel had advised DeGand that he "hoped" the sentence would run concurrently. In denying relief, the Eighth Circuit stated that the ". . . erroneous advice of counsel as to the penalty which may be imposed does not, by itself, lead to manifest injustice sufficient to allow a defendant to withdraw his guilty plea." *DeGand*, 614 F.2d at 178. Though not relied upon by the Court below, see also, *Barbee v. Ruth*, 678 F.2d 634 (5th Cir. 1982) cert. denied, 103 S.Ct. 149 (1982) (defendant understood length of sentence he might possibly receive and thus was fully aware of the plea's consequences; plea not involuntary because defendant not advised of effect a consecutive life sentence would have on parole eligibility).

The district court and the Eighth Circuit decisions also relied upon *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980). The petitioner there sought habeas corpus relief claiming the court, the prosecutor and defense counsel had misled him regarding his guilty plea because he had been misinformed about his parole eligibility date. The defense attorney there advised petitioner what he "might anticipate" as to parole eligibility but did not promise a definite sentence. Although

accepting petitioner's claim he had been misinformed, the Second Circuit stated that "[t]he voluntariness of a guilty plea is not undermined by a lack of explanation as to the mechanics of a parole system." *Hunter* 616 F.2d at 61.

Generally, a defendant need not be informed regarding parole eligibility because that matter is not a direct consequence of his guilty plea. *Bell v. North Carolina*, 576 F.2d 564 (4th Cir. 1978) cert. denied, 439 U.S. 956 (1978), (defendant sought to set aside guilty plea because he was not advised that, as a recipient of a life sentence, he would not be eligible for parole for twenty years; consequences which must be understood are those that flow from plea; potential parole eligibility, absent special limitations, is not a direct incident to a guilty plea and need not be previously communicated to a defendant; failure to inform defendant does not render plea involuntary); *United States v. Garcia*, 698 F.2d 31 (1st Cir. 1983) (defendant sought to set aside plea entered in federal court on grounds she was not advised of certain factors affecting her parole eligibility; nothing in principles of due process require advice omitted here nor renders plea unintelligent or involuntary; absent showing defendant was unaware of actual statutory sentencing possibilities or that omitted information would have made any difference, relief denied); *Trujillo v. United States*, 377 F.2d 266 (5th Cir. 1967), quoting with approval *Smith v. United States*, 324 F.2d 436, 441 (D.C. Cir. 1963) (eligibility for parole is not a consequence of a plea of guilty, but a matter of legislative grace); *Roberts v. United States*, 491 F.2d 1236, 1238 (3d Cir. 1974); *Hunter v. Fogg*, 616 F.2d at 61 (2d Cir. 1980); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979). This general principle also applies in Arkansas. *Carter v. State*, 283 Ark. 23, 670 S.W.2d 439 (1984) (Matter of parole lies solely within control of Department of Correction and it would be sheer speculation for attorney or court to advise defendant regarding percentage of time to be

served). See also, *Deason v. State*, 263 Ark. 56, 61, 562 S.W.2d 79 (1978).⁶

As noted by the Eighth Circuit Court of Appeals in its opinion, federal courts, pursuant to a 1974 amendment to Federal Rules of Criminal Procedure 11, no longer are required to inform a defendant at the plea hearing as to parole eligibility. (Petition for Writ of Certiorari, Appendix B 4, n.2). In *United States v. Timmreck*, 441 U.S. 780 (1979) a technical violation of Federal Rules of Criminal Procedure 11, to-wit, the district judge's failure to explain the mandatory parole provision to a defendant at the hearing on his plea of guilty, did not support a collateral attack on the plea itself. It was concluded that the claimed error did not cause a complete miscarriage of justice nor result in proceedings inconsistent with the rudimentary demands of fair procedure. Respondent notes the defendant there did not argue that he was unaware of the mandatory parole term or, had he been properly advised, he would not have pleaded guilty. Significant, however, is the Court's

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See also, *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982), cert. denied 103 S.Ct. 497 (1982) (defendant sought to set aside plea of guilty to two consecutive life sentences because not informed of 7 year mandatory minimum sentence for armed robbery; held that defendant's ineligibility for parole is not a direct consequence of his guilty plea because he could not reasonably have expected to receive a more favorable parole eligibility); *McIntosh v. State*, 627 S.W.2d 652 (Mo. App. 1981) (record of plea hearing established plea voluntarily entered; changes in parole laws were collateral consequences of plea and counsel's failure to inform defendant not enough to vitiate plea); *United States v. Garcia*, 636 F.2d 122 (5th Cir. 1981) (defendant informed of penalties but no constitutional requirement for explanation of parole or probation possibilities).

Collateral consequences of a guilty plea include: *United States v. Crowley*, 529 F.2d 1066 (3d Cir. 1976), cert. denied, 425 U.S. 995 (1976) (loss of civil service job); *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364 (4th Cir. 1973), cert. denied, 414 U.S. 1005 (1975) (nature of institution to which defendant is sent); *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964), cert. denied, 380 U.S. 916 (1965) (loss of rights to vote and travel abroad).

expressed concern with finality as served by the limitation on collateral attack which has special force on convictions based on guilty pleas. *Id.* at 784.⁷

Since it is unnecessary for a defendant to be informed regarding parole eligibility, it has followed that erroneous advice on that issue is not grounds on which a guilty plea may be vacated. *Brown v. Perini*, 718 F.2d 784 (6th Cir. 1983); *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984), discussed, *infra*; and *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980), discussed, *supra*.

In *Brown v. Perini*, 718 F.2d 784 (6th Cir. 1983) the Sixth Circuit denied habeas relief to Brown who sought to set aside his guilty plea on the grounds he had been affirmatively misinformed regarding his parole eligibility date. Brown agreed to plead guilty on two counts of aggravated murder aware of state's evidence going to his identity as the perpetrator of the crimes and the possibility of receiving the death penalty. During plea negotiations, there was some confusion regarding parole eligibility because of recent revisions in Ohio's penal code. Defense counsel advised Brown that parole eligibility for aggravated murder was ten years but that his colleagues believed the fifteen year eligibility requirement was applicable. The trial

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Quoting *United States v. Smith*, 440 F.2d 521, 528-529 [(7th Cir. 1971)] (Stevens, J., dissenting) the Court concluded its opinion by stating:

'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by, increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'

judge, off-the-record, expressed the opinion that Brown would be eligible for parole in ten years. After pleading guilty and being sentenced, Brown was subsequently advised by prison authorities he would not be eligible for parole until he had served fifteen years.

Although a magistrate's evidentiary hearing was held on Brown's habeas petition, the district court rejected the magistrate's finding that Brown's guilty plea was premised on his belief that he would be eligible for parole in ten years, and denied relief. On appeal the Sixth Circuit assessed the issue as whether Brown's plea was a voluntary and intelligent choice and focused its analysis on the state court record of the plea hearing. The Court of Appeals concluded the plea was entered attendant with the necessary constitutional safeguards and that misinformation concerning the collateral consequences of Brown's plea was not a violation of due process which would render the plea involuntary.

Of course, petitioner's argument advanced in his brief is to the contrary, as supported by cited caselaw. See, e.g., *People v. Tabucchi*, 64 Cal. App. 3d 133, 134 Cal. Rptr. 245 (1976); *People v. Willis*, 61 Ill.2d 105, 330 N.E.2d 505 (1975); *Murphy v. State*, 663 S.W.2d 604 (Tex. App. 1983); *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977); *Washington v. Harmony*, 5 Wash. App. 719, 491 P.2d 660 (1971). Petitioner, as well as the dissenting opinion to the decision rendered below, rely on *Strader v. Garrison*, *supra*, in support of their respective positions that a guilty plea should be vacated in such cases. The basis for that position is that a defendant, having pleaded guilty upon erroneous advice regarding parole eligibility, has not been fully informed of the consequences of his plea. Furthermore, defense counsel who misinforms a defendant has not been effective in his representation and thus, the defendant has been denied his right to competent counsel.

Strader, and a companion case, *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983) are distinguishable from the circumstances of the instant case. In both cases there was a finding that the petitioner's guilty plea was induced by misadvice of defense counsel regarding parole eligibility.

The *Strader* Court stated:

Here, though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel. When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation. 611 F.2d at 65.

That *Strader* and *O'Tuel* are not controlling is indicated by a later decision rendered by the Fourth Circuit Court of Appeals, *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984). In the *Little* case, petitioner entered a negotiated plea to second degree murder and was sentenced to 25 to 30 years imprisonment. Little testified at his subsequent habeas corpus hearing that defense counsel told him the "deal worked out" was that Little could make parole in five years. Defense counsel denied making any promise to Little regarding the sentence he would receive and told petitioner he would be eligible for parole after serving one-fifth of his maximum sentence, but no maximum sentence had been set as yet.

The district court granted habeas corpus relief because of defense counsel's gross misinformation regarding parole possibilities, relying on *Strader* and *O'Tuel*. In reversing the district court and holding those cases inapplicable, the Fourth Circuit noted that neither petitioner nor defense counsel knew what sentence would be imposed. *Little v. Allsbrook*, 731 F.2d at 241.

Thus, defense counsel's advice merely amounted to an erroneous sentence estimate and Little's erroneous expectation based on that estimate did not render his subsequent plea involuntary. Since Little had never been specifically assured of what his sentence would be, he could not have been "grossly misinformed" about his parole eligibility. The Fourth Circuit recognized that permitting Little to vitiate his plea because of his purported expectation

would open the door to habeas relief for all prisoners whose lawyers underestimated the length of their sentences. Such a holding would seriously undermine the finality of judgments entered pursuant to plea bargains. *Little v. Allsbrook*, 731 F.2d at 242.

Turning to the facts of the case at hand, petitioner executed a plea statement prior to entry on the record of his guilty plea. In that statement, petitioner expressed his understanding of the following essential factors pursuant to the waiver of rights inherent in entering a plea of guilty: (a) the minimum and maximum sentence that could be imposed; (b) waiver of right to trial by jury and right to appeal; (c) what he was charged with having done; (d) that he had discussed his case fully with his attorney and was satisfied with his services; (e) that his plea of guilty was not induced by any force, threat or promise apart from the plea agreement; and (f) the judge was not required to carry out any understanding between petitioner, his attorney, the prosecuting attorney, and that power of sentence was with the court only. The statement reflects that petitioner, with "0" prior convictions, could have received a sentence of from 5-50 [years] or life imprisonment and/or a fine of up to \$15,000. [See, Ark. Stat. Ann. §41-1502(3); §41-901(1)(a);

§41-1101(1)(a) (Repl. 1977)].⁸ The statement also advised petitioner that, if he was guilty, he could plead guilty and the judge would decide what the sentence would be. (Joint Appendix 28-29).

At the sentencing hearing held that same date, the State deputy prosecuting attorney recommended to the trial court that a total sentence of 35 years be imposed. That negotiated plea (35 years for murder in the first degree and 10 years for theft of property, sentences to run concurrently) was recommended in exchange for petitioner's plea of guilty. (Joint Appendix 66-67). In Arkansas, the prosecutor's recommendation regarding a negotiated plea is not binding on the trial court. Ark.R.Crim.P. 25.3, Ark. Stat.

Ann. Vol. 4A (Repl. 1977).⁹ See also, *Mabry v. Johnson*, ___ U.S. ___, 104 S.Ct. 2543, n. 5, 81 L.Ed.2d 437 (1984) (under Arkansas law, recommended sentence does not bind the trial court).

Petitioner advised the trial court that he wanted to plead guilty with the negotiated sentence in mind and stated on the record that he was guilty. (Joint Appendix 67). Upon being questioned by the judge, petitioner acknowledged his signature appeared on the bottom of the plea statement; his attorney had explained the statement to him; he understood the statement and had no questions about it; and no threats or promises had been made to get him to enter the plea of guilty, other than the negotiated plea. (Joint Appendix 67-68). Petitioner then, in his own words, described the circumstances of the murder and theft, stating he shot the victim with the victim's pistol, a

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Ark. Stat. Ann. §41-1502 (3) (Repl. 1977) provides:

* * *

(3) Murder in the first degree is a class A felony.

Ark. Stat. Ann. §41-901 (1)(a) (Repl. 1977) provides:

(1) A defendant convicted of a felony may be sentenced to a term of imprisonment:

(a) not less than five (5) years nor more than fifty (50) years, or life, if the conviction is of a class A felony;

* * *

Ark. Stat. Ann. §41-1101 (1)(a) (Repl. 1977) provides:

(1) A defendant convicted of a felony may be sentenced to pay a fine:

(a) not exceeding \$15,000, if the conviction is of a class A or B felony;

* * *

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Pursuant to Ark.R.Crim. P. 25.1, 25.3, Ark. Stat. Ann. Vol 4A (Repl. 1977) a plea agreement is not binding on the trial judge but the court may permit the agreement to be disclosed to him and may concur therein:

RULE 25.1 Propriety of Plea Discussions and Plea Agreements.

(a) In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with the defendant only through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

(b) Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

* * *

RULE 25.3 Responsibilities of the Trial Judge.

(a) The judge shall not participate in plea discussions.

(b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea.

(c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

- (i) the agreement is not binding on the court; and
- (ii) if the defendant pleads guilty or nolo contendere the disposition may be different from that contemplated by the agreement.

(d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the court.

.36 derringer, and stole his car. (Joint Appendix 68-69).¹⁰ Petitioner, on the record, waived his rights attendant to a trial by jury and acknowledged it was his decision to plead guilty to 35 years for murder and 10 years for theft of property after advising with his attorney. (Joint Appendix 69). Petitioner's plea of guilty was accepted by the judge and sentence, as reflected by the negotiated plea, was thereupon imposed. The only mention of parole was made by the trial court who, as indicated earlier, advised, after sentencing petitioner, that he would be required to serve *at least* one-third of his time before becoming eligible for parole. After being sentenced, petitioner indicated he had no questions about the plea or sentence or anything concerning his case. (Joint Appendix 69-70).

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At the plea hearing, petitioner described his guilty conduct as follows:

THE COURT: Tell me shortly just in your own words what happened in this case? Where were you, first, the location?

DEFENDANT HILL: In Little Rock. We started out at a bar, the Gas Light, and he, Darrell Pitts, did something that I didn't like and it ended up in my shooting him and I stole his car. That is basically the run down of the facts.

THE COURT: These things that he did that you didn't like, was it necessary that you shoot him?

DEFENDANT HILL: I felt like it was.

THE COURT: Well, in what respect?

DEFENDANT HILL: Well, he hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him. I am not saying I should have killed him but that was my way of solving the problem.

THE COURT: Where did you get the pistol?

DEFENDANT HILL: It was his pistol, a 36. Derringer.

THE COURT: Did you take it away from him?

DEFENDANT HILL: No. After he hit me in the teeth with it, when he got in the car he threw it at me and later on, after we took the other guy to the hospital, on the way back that is when I used it and shot him.

THE COURT: Did he have a pistol?

DEFENDANT HILL: No, your Honor. He had a knife.

THE COURT: Was he threatening you with a knife?

DEFENDANT HILL: He didn't have it pointed at me but he had it where it could have been used as a weapon against me.

THE COURT: Was he driving the car at the time you shot him?

DEFENDANT HILL: No. I was driving the car.

THE COURT: You were driving the car? Whose car was it?

DEFENDANT HILL: His car.

THE COURT: What did you do with him after you shot him?

DEFENDANT HILL: Put him in the Arkansas Traveler Motel. It was our room. We were working on a construction crew and being kept at that motel and then I took off and fled the state with his car and his gun.

THE COURT: How did you get him into the room?

DEFENDANT HILL: I carried him in, kinda drug him in.

Joint Appendix 68-69.

In Arkansas, a defendant, during post-conviction proceedings who fails to testify or allege he is not guilty, where he has previously admitted his guilt at the hearing on his entry of the plea of guilty, does not prove prejudice by his claim that counsel was ineffective. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

As is conclusively established by the state court record, neither the State, defense counsel, nor the circuit court made any promise to petitioner regarding eligibility for parole.¹¹ The plea agreement here was for a negotiated sentence *recommendation* by the State of 35 and 10 years, respectively. The plea hearing reflects the State honored its promise to petitioner. Thus, this is not a case in which a defendant relied on a promise made by a government attorney, and entered a plea of guilty, only to have the government breach the agreement to the defendant's detriment. Compare, *Santobello v. New York*, 404 U.S. 257 (1971); *Allen v. Cranor*, 45 Wash. 2d 25, 272 P.2d 153 (1954) (cited by petitioner but is thus distinguishable). Although the circuit court was not legally required to honor or accept the negotiated plea, it did so and sentenced petitioner accordingly.

Inasmuch as petitioner here was fully aware that the recommended sentence was not binding on the circuit court, counsel's advice regarding parole eligibility, even if erroneous on a statutory provision, amounts to no more than an estimate or prediction as to the sentence petitioner

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See, e.g., *Williams v. Wainwright*, 604 F.2d 404 (5th Cir. 1979) (record of plea hearing revealed defendant not promised anything other than 12 year sentence he actually received; although not conclusive, raised a "presumption of verity"); *Walden v. United States*, 418 F. Supp. 386 (E.D. Pa. 1976) (attorney advised defendant his cooperation might help; no promise made amounts to a prediction as to sentence); *United States v. Heldon*, 579 F.Supp. 1299 (E.D.Pa. 1984) (absent a plea agreement, plea is not involuntary merely because defendant relied upon inaccurate prediction of counsel as to sentence); *Hayes v. State*, 417 So.2d 579 (Ala. Cr. App. 1982) (defendant contended he understood and thought he would get probation when he pleaded guilty, but in executed plea statement he understood there were no agreements with the state; allegations characterized as result of fertile minds of cunning criminals); *Seiller v. United States*, 544 F.2d 554 (2d Cir. 1975) (defendant claimed he was advised by counsel to plead guilty and he would receive suspended sentence because of his ill health; even if true, mistaken estimate of sentence by defense counsel will not invalidate guilty plea).

would receive when he pleaded guilty. *United States v. Boniface*, 601 F.2d 390 (9th Cir. 1979) (attempting to set aside his guilty plea entered in federal district court, defendant contended, and defense counsel admitted, that counsel suggested plea be entered to a particular count while under misapprehension that count carried maximum sentence of five years; but record of plea hearing was conclusive that district court not bound by government's recommendation and thus plea not vitiated because of counsel's erroneous advice); *Wellnitz v. Page*, 420 F.2d 935 (10th Cir. 1970) (defense counsel and state's attorney agreed on 25 year sentence but judge sentenced defendant to 100 years; an attorney may offer his client sentence possibilities but absent reckless promise of a specific sentence or an assurance of leniency, defendant's erroneous expectation, based upon erroneous estimate by counsel does not render plea involuntary); *Hollis v. United States*, 687 F.2d 257 (8th Cir. 1982), cert. denied 103 S.Ct. 1228 (1983) (pursuant to a 28 U.S.C. §2255 petition, defendant contended his attorney told him maximum sentence he would receive would be five years but failed to inform him of maximum sentence under statute; plea not set aside as involuntary where defendant has been informed that sentencing rests in discretion of trial court, he understood negotiated plea and no promises made to him other than the plea agreement).

Such an erroneous prediction by defense counsel does not render petitioner's plea involuntary since, as a patently clear factual matter, petitioner was not falsely induced to plead guilty. In other words, since petitioner did not know if the circuit court would accept the recommended sentence of 35 years, he could not justifiably predicate his decision to plead guilty on a promise that he would be eligible for parole after one-third of that term (six years) as opposed to

one-half of that term (nine years), with credit for maximum good time.¹²

Until the state's recommended sentence and petitioner's plea of guilty were accepted by the circuit court and he was sentenced, a starting date for parole eligibility did not even come into play. As recognized in *Mabry v. Johnson*, ____ U.S. ___, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437, 442 (1984), "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest."

Of course, respondent does not concede that parole eligibility was part of petitioner's negotiated plea in this case. But even so, the circuit court was free to reject the bargain and sentence petitioner within the maximum range

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Computation of petitioner's sentence, with respect to the numerical prediction under the applicable parole eligibility law was discussed by the district court as follows:

"... The court was entirely correct in stating, *after accepting the plea of guilty*, that the defendant would have to serve *at least* one-third of his sentence before becoming eligible for parole. Strictly speaking, that would entail a term of approximately 12 years (one-third of 35 years). If the one-third rule applied to the petitioner, and he accrued maximum good time (one month for each month served [Ark. Stat. Ann. §§46-120-46-120.5 (Repl. 1977)]), he could have been eligible for parole in six years. As it now stands, the one-half rule applies and, coupled with maximum good time, he could be eligible for parole in nine years. Nine years is actually *less* than one-third of the actual sentence imposed, yet the Court would be appalled if the state contended that, because the judge stated that the petitioner had to serve *at least* one-third of his sentence, the petitioner had to actually serve 12 years. The petitioner wants the bargain to cut but one way, his way, and thus one of the 'many flaws in the plea bargaining system is exposed.' " (Petition for Writ of Certiorari, Appendix A 11-12).

under Arkansas law. Thus, petitioner's expectation amounted to no more than a subjective belief of what his sentence would be, coupled with a hope for leniency.¹³ A concurrent sentence of 35 years for two crimes when petitioner could have been sentenced to 50 years or life imprisonment on the first degree murder charge alone compels the conclusion that petitioner's goal in pleading guilty was to avoid a harsh sentence, not his desire to be eligible for parole after serving one-third of his time.¹⁴

Respondent strongly contends that the district court and Court of Appeals were correct in holding that parole eligibility after serving one third of petitioner's sentence was not a part of the negotiated plea bargain and thus, did not form the basis or any inducement for petitioner's plea of guilty on which he can be said to have relied. (Petition for Writ of Certiorari, Appendix A 2-3; Appendix B 5). That petitioner was induced by the alleged misadvice of defense counsel appears to be the main thrust of petitioner's brief

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The Fifth Circuit Court of Appeals has held that the subjective belief of a defendant is not sufficient ground for setting aside a plea of guilty. See, e.g., *Grantling v. Balkcom*, 632 F.2d 1261 (5th Cir. 1980) (state habeas petition, defendant's subjective belief he would not get a fair trial not sufficient to invalidate a guilty plea); *Matthews v. United States*, 569 F.2d 941 (5th Cir. 1978), cert. denied, 439 U.S. 1046 (1978) (federal habeas petition; defendant contended he failed to speak up at plea hearing because he was afraid of judge's hostile attitude, would refuse his plea or he might get a harsher sentence; subjective belief insufficient to invalidate guilty plea).

In *United States v. Henderson*, 565 F.2d 1119 (9th Cir. 1977), cert. denied, 435 U.S. 955 (1978) defendant contended the government's attorney promised him four years maximum sentence, to run concurrent with another sentence he was serving. Defendant here understood sentence was within discretion of judge and thus, a disappointed hope for leniency, without more, does not render a guilty plea invalid.

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Petitioner does not dispute the fact that he had a prior conviction at the time he entered his guilty plea.

on the merits. Petitioner cites several cases in which it was indicated that a guilty plea must be set aside in such cases or an evidentiary hearing is necessary to determine the credibility of a defendant's allegations of misrepresentation. See, e.g., *United States v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *People v. Owsley*, 66 Ill. App. 3d 234, 383 N.E.2d 271 (1978); *ExParte Young*, 644 S.W.2d 3 (Tex. Cr. App. 1983).¹⁵ The dissenting opinion of the Court of Appeals decision below expressed a similar view. (Petition of Writ of Certiorari, Appendix B 12: "The collateral consequences rule should not bar an ineffective assistance of counsel claim, however, where an attorney's misadvice respecting a collateral consequence induces a defendant to plead guilty.")

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In addition see, *McBryar v. McElroy*, 510 F.Supp. 706 (N.D. Ga. 1981) (defendant, who pleaded guilty contended his attorney advised him that if he cooperated he would receive probation; defendant sentenced to seven years; should have held evidentiary hearing, for guilty plea induced by assurances of defense counsel); *United States v. Unger*, 665 F.2d 251 (8th Cir. 1981) appeal after remand, 700 F.2d 445 (8th Cir. 1981), cert. denied, 104 S.Ct. 339 (1983) (defendant contended guilty plea not voluntary because defense attorney told her she would receive probation; allegations found to be credible that guilty plea was induced by misrepresentation).

Compare, *Griffin v. Martin*, 278 S.Car. 620, 300 S.E.2d 482 (1983) (defendant advised by defense counsel he would be eligible for parole in 10 years if he pleaded guilty but under state law, not eligible for 20 years; parole eligibility a collateral consequence of a guilty plea and defendant failed to prove reliance at post-conviction hearing); *Trevino v. State of Arizona*, 527 F.2d 439 (9th Cir. 1975) (attorney told defendant he would be eligible for parole within 7 years but under state law not eligible for parole unless sentence commuted; after full habeas hearing, court concluded plea motivated by desire to avoid death penalty and resulted from negotiated plea); *State v. Perez*, 654 P.2d 708 (Wash. App. 1982) (defendant contended she pleaded guilty because prosecutor advised she would be promptly considered eligible for parole but when defendant got to prison, found out she was not eligible for intensive parole; after hearing on motion to withdraw plea, determined that plea not so much induced by agreement but by misplaced hope of eligibility for intensive parole; counsel not ineffective, just optimistic).

That position, as well as petitioner's allegations in his habeas petition should be rejected as conclusively disputed by the verity of the state court record of the plea hearing. (See petitioner's allegations in his habeas petition, Joint Appendix 8-9). *McMann v. Richardson, supra; Brown v. Perini, supra*

Petitioner executed a plea statement and thereafter, acknowledged his signature thereon to the trial court. Petitioner, in open court, advised he had no question regarding the statement, admitted his guilt and entered his plea on the record. Petitioner thus should not be permitted to set aside his "[s]olemn declarations [made] in open court. . ." *Blackledge v. Allison*, 431 U.S. at 74.

IV.

In *Tollett v. Henderson*, 411 U.S. 258 (1973) the Court acknowledged that the general rule for governing collateral attacks on convictions based on guilty pleas had been set forth in *McMann v. Richardson*, 397 U.S. 759 (1970). As stated in *McMann*, a habeas petitioner who has pleaded guilty with the advice of counsel must demonstrate that advice was not "within the range of competence demanded of attorneys in criminal cases, . . ." not whether counsel's advice, in retrospect, was right or wrong. *Tollett v. Henderson*, 411 U.S. at 264, 266, citing *McMann v. Richardson*, 397 U.S. at 770-771. The Court observed that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, . . ." *Tollett v. Henderson*, 411 U.S. at 266.

Recently in *Strickland v. Washington*, ____ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) this Court announced a two component standard for assessing a defendant's challenge to his attorney's representation at trial.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 1045 S.Ct. at 2064, 80 L.Ed.2d 693.

In articulating these standards, the Court rejected the notion that more specific guidelines were appropriate. *Id.* at 104 S.Ct. 2065, 80 L.Ed.2d at 693. Observing that the purpose of the Sixth Amendment guarantee of effective assistance is to ensure that criminal defendants receive a fair trial, it was expressed that counsel's conduct must be judged on the facts of a particular case viewed at the time of counsel's conduct. As to the prejudice component, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 104 S.Ct. 2068, 80 L.Ed.2d at 698.

Respondent notes that the standards set forth in *Strickland* are indicated to apply to ordinary trials where the focus of a claim of ineffective assistance is on specific errors and omissions rather than counsel's performance as a whole. *Strickland v. Washington*, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *United States v. Cronic*, ____ U.S. ___, 104 S.Ct. 2039, 80 L.Ed. 657, n. 20 (1984). It is submitted, however, that the two component, performance and prejudice standard can be said to embellish the standard previously announced in *McMann v. Richardson, supra*. If the prejudice component has not previously been clearly applicable to collateral attacks on guilty pleas, respondent strongly urges the Court to extend that premise here. Public policy favoring finality of judgments in criminal cases, especially those which have come about by entry of a

guilty plea on a presumptively conclusive hearing record, compel this result.¹⁶

Assuming, *arguendo*, that defense counsel herein misadvised petitioner regarding his eligibility for parole, petitioner here cannot compel a determination that he was prejudiced. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, ____ U.S. ___, 104 S.Ct. at 2067, 80 L.Ed.2d at 696 (1984).

The district court, as well as the Court of Appeals, concluded that even if defense counsel had misadvised petitioner, that fact does not render counsel's performance constitutionally inadequate. (Petition for Writ of Certiorari, Appendix A 10; Appendix B 5-7). As indicated by the cases relied upon in both opinions and those discussed, *infra*, respondent asserts that this position reflects the better rule of law, to-wit, parole eligibility is not a direct consequence of a plea of guilty. Thus, advice thereon should not be held as rendering a plea involuntary where the state court record presumptively establishes the advice was not part of the plea bargain or induced the plea. Likewise important, the recommended sentence was not binding on the trial court and thus the issue of parole eligibility amounts to no more than a sentence estimate by counsel on which the defendant based his erroneous expectation and a hope for leniency. *Brown v. Perini*, *supra*; *Little v. Allsbrook*, *supra*. Respondent is aware of no case law precedent which indicates that all terms and conditions discussed in the plea bargaining process, whether between defense counsel and his client, or even those discussed with the state's attorney,

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See also, *United States v. Frady*, 456 U.S. 152 (1982) (collateral attack brought pursuant to 28 U.S.C. §2255 in federal court; proper standard for review is "cause and actual prejudice"); *Engle v. Isaac*, 456 U.S. 107 (1982) (procedural default in habeas cases must satisfy "cause" and "prejudice" standard).

can be held to have induced a plea of guilty. Such a precedent will be set by this case if habeas relief is granted to the petitioner.

As established by the state court record, this is not a case in which the defendant was not accurately advised regarding the minimum and maximum range of punishment which could be imposed, nor does he make such a claim. Compare, *Lewellyn v. Wainwright*, 593 F.2d 15 (5th Cir. 1979) (defendant in state court proceeding not advised regarding maximum sentence; plea was involuntary since sentence was a direct consequence of the plea). Neither is this a case in which counsel erred in advising his client on an issue of law which exposed the defendant to a mistaken belief regarding a harsher sentence if he were tried and thereby caused him to forego his right to a jury trial. See, e.g., *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972) (error in indictment and defense counsel's misinterpretation of it led defendant to believe maximum sentence range was 60 years when it was 10 years; counsel's error on the law was held to be gross misadvice and counsel rendered ineffective); *Hammond v. State*, 528 F.2d 15 (4th Cir. 1975) (similar facts); *United States v. Rumery*, 698 F.2d 764 (5th Cir. 1983) (similar facts). Nor did petitioner here rely on counsel's error of law thereby causing him to unknowingly waive a constitutionally protected right. *United States ex rel. Healey v. Cannon*, 553 F.2d 1052 (7th Cir. 1977) (defense counsel advised defendant his guilty plea would not preclude appellate review of admissibility of evidence; since appellate review waived by plea, guilty plea held not voluntarily and intelligently entered). Even an incorrect statement of the law as to sentencing range where the defendant was not prejudiced thereby has been held to not vitiate a guilty plea. *Hill v. Estelle*, 653 F.2d 202 (5th Cir. 1981), cert. denied 454 U.S. 1036 (1981) (defendant contended he was not advised on range of punishment in new state criminal code; but recommended sentence well above minimum sentence which served no limiting effect on parole eligibility; counsel not ineffective for failure to advise on an issue of law).

The issue here concerns petitioner's eligibility for parole. Respondent is cognizant of this Court's recognition "that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver v. Graham*, 450 U.S. 24, 32 (1981) (state statute reducing good time credits violated ex post facto clause), citing *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974). But, recognizing the subjective variables and the assessment of a "multiplicity of imponderables" that factor into the parole release decision, the Court has specifically held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Cor.*, 442 U.S. 1, 7, 10 (1979). In *Greenholtz*, the Nebraska parole procedure which afforded an inmate an opportunity to be heard when denied parole, was approved as complying with due process. It was indicated that the possibility of parole provides an inmate with nothing more than the mere hope that the benefit will be obtained, an interest no more substantial than the hope that he will not be transferred to another prison, neither of which is protected by due process. *Id.* at 11.

Similarly, the applicable statutory provisions regarding parole in Arkansas provide for petitioner's eligibility for parole. Ark. Stat. Ann. §§43-2828(2); 43-2829

(Repl. 1977).¹⁷ Thus, petitioner herein possessed not the right but the possibility of parole pursuant to Arkansas law. *Robinson v. Mabry*, 476 F.Supp. 1022 (E.D. Ark. 1979). Petitioner's expectation that he would be eligible for parole after serving one-third of his time when, under statute, he is not eligible for parole until serving one-half, did not work to lengthen the duration of his sentence. That expectation amounts to no more than the mere denial of parole which, it has been held, does not increase a convicted defendant's sentence. *Roach v. Ark. Bd. of Pardons & Paroles*, 503 F.2d

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Ark. Stat. Ann. §43-2828 (2) (Repl. 1977) provides:

43-2828. Classification of inmates. — For the purposes of this Act [§§43-2828 – 43-2833], inmates shall be classified as follows:

* * *

(2) Second offenders shall be inmates convicted of two or more felonies and who have been once incarcerated in some correctional institution in the United States, whether local, state or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or offenses for which they are being classified.

Ark. Stat. Ann. §43-2829 B.(3) (Repl. 1977) provides:

43-2829. Parole eligibility.—

* * *

B. Persons who commit felonies on and after April 1, 1977, and shall be convicted and incarcerated for the same, shall be eligible for release on parole as follows: * * *

(3) Inmates classified as second offenders under this Act upon entering a correctional institution in this State under sentence from a circuit court shall not be eligible for release on parole until a minimum of one-half (1/2) of their sentence shall have been served, with credit for good time allowances, or one-half (1/2) of the time to which sentence is commuted by executive clemency, with credit for good time allowances.

1367 (8th Cir. 1974) (denial of parole has effect of maintaining status quo); *Page v. United States Parole Commission*, 651 F.2d 1083, 1085 (5th Cir. 1981) (denial of parole merely requires the petitioner to serve out the length of his sentence).

In *United States v. Addonizio*, 442 U.S. 178 (1979) this Court held that changes in parole policies affect the manner in which judgment and sentence are to be performed, not the lawfulness of the judgment itself. There, the district judge sentenced the defendant to a term of years with the expectation that the defendant would be released after serving one-third of his sentence. After the defendant's incarceration, the parole policies were changed and defendant was denied release. In denying federal habeas relief, it was held that defendant's challenge to his sentence did not satisfy the established standards of collateral attacks on a judgment. The sentence imposed was within statutory limits and thus, the proceeding was not infected with an error of fundamental magnitude.¹⁸

Petitioner here bargained for 35 years imprisonment, and that is the sentence that was imposed. Whether petitioner is eligible for parole after serving one-third of that term, or one-half, that is the term he must serve. Administrative changes in the parole eligibility rules can still affect the date of petitioner's ultimate release subject, of course, to the petitioner's behavior and other subjective

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In Arkansas, a prisoner's challenge to his parole eligibility date will not be considered in post-conviction proceedings. *Bargo v. Lockhart, Director*, 279 Ark. 180, 650 S.W.2d 227 (1983).

criteria.¹⁹ Those changes, however, will not affect the judgment of 35 years imprisonment to which petitioner has been sentenced. Petitioner here wants the 35 year sentence and an early release eligibility date. He is not entitled to have the bargain "cut but one way, his way," however, as noted by the district court below. (Petition for Writ of Certiorari, Appendix A 12).

Respondent has chosen to discuss the impact of parole eligibility on the issue of competency of counsel. The principles discussed herein, however, lend themselves well to the discussion, *infra*, that advice regarding parole eligibility amounts to nothing more than a sentence estimate by defense counsel which is not binding on the court any more than a negotiated sentence recommended by the state.

In conclusion, respondent asserts that petitioner was not prejudiced by counsel's advice, even if rendered in error on an accessible statutory provision.²⁰ To hold otherwise would leave room for claims that an attorney's failure to correctly advise on a matter contained in an applicable statute renders counsel incompetent *per se* and thereby, a defendant is presumed to have been prejudiced.

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In *Parker v. Corrothers*, 750 F.2d 653 (8th Cir. 1984) reh. denied (1985) the Eighth Circuit Court of Appeals reaffirmed the holding that Arkansas' parole statutes do not create a constitutionally protected liberty interest. The Court of Appeals did conclude, however, that a liberty interest was created in a specific parole regulation regarding considerations reviewed by the Parole Board. The application and assessment of parole regulations are not at issue here.

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The Court in *Strickland v. Washington*, ____ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) indicated that the performance and prejudice components of the standards set forth may be assessed in any particular order, or that both need not be assessed if the defendant makes an insufficient showing on one. "The object of an ineffectiveness claim is not to grade counsel's performance." 104 S.Ct. at 2070, 80 L.Ed.2d at 669.

This Court has affirmatively recognized that criminal convictions should be accorded finality and that the presumption of finality is at its strongest in collateral attacks on judgments in criminal cases. *Blackledge v. Allison, supra*; *Strickland v. Washington, supra*. Those principles should be held to obtain no less to the facts of this case, especially on the strength of the state court record of petitioner's guilty plea and the mere expectation inherent in the administrative decision of parole release. As observed by the district court below, to hold otherwise, "would be to establish a basis for reopening every plea bargaining arrangement any time a defendant did not become eligible for parole at the time estimated by the attorneys or the court." (Petition for Writ of Certiorari, Appendix A 12). To grant petitioner habeas relief, or even to afford him an evidentiary hearing would, in this case, be inconsistent with this Court's most recent decisions involving collateral attacks on criminal convictions. *Strickland v. Washington, supra*; *Mabry v. Johnson, supra*; *United States v. Cronic, supra*; *United States v. Frady*, 456 U.S. 152 (1982). Accordingly, the relief requested by petitioner should be denied.

CONCLUSION

For the foregoing reasons supported by citations to legal authority, respondent prays that the judgment of the Eighth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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